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Facilitating the cross-border insolvency of enterprise groups: draft legislative provisions

Note by the Secretariat

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I. Introduction

1. At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of enterprise groups¹ by developing provisions on a number of issues that would extend the existing articles of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing MLCBI, it noted that the precise form they might take could be decided as the work progressed.

2. At its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2015) sessions, the Working Group considered the goals of a text that might be developed to facilitate the cross-border insolvency of enterprise groups; the key elements of such a text, including those that might be based upon part three of the Legislative Guide and on MLCBI; and the form that the text might take, noting that some of the key elements lent themselves to being developed as a model law, while others were perhaps more in the nature of provisions that might be included in a legislative guide (A/CN.9/WG.V/WP.120, 124 and 128 respectively).

3. At its forty-eighth session (December 2015), the Working Group agreed a set of key principles for a regime to address cross-border insolvency in the context of enterprise groups (A/CN.9/WG.V/WP.133) and considered a number of draft provisions addressing three main areas (A/CN.9/WG.V/WP.134): (a) coordination and cooperation of insolvency proceedings relating to an enterprise group; (b) elements needed for the development and approval of a group insolvency solution involving multiple entities; and (c) the use of so-called "synthetic proceedings" in lieu of commencing non-main proceedings. Two additional supplemental areas were also considered. These might include (d) the use of so-called "synthetic proceedings" in lieu of commencing main proceedings, and (e) approval of a group insolvency solution on a more streamlined basis by reference to the adequate protection of the interests of creditors of affected group members.

4. At its forty-ninth session (May 2016), the Working Group considered a consolidated draft legislative text incorporating the agreed key principles and draft provisions addressing the five areas indicated in paragraph 3 (A/CN.9/WG.V/WP.137 and Add.1). That draft text was further considered at the fiftieth (December 2016), fifty-first (May 2017) and fifty-second (December 2017) sessions (A/CN.9/WG.V/WP.142 and Add.1; A/CN.9/WG.V/WP.146 and A/CN.9/WG.V/WP.152 respectively).

5. The draft text below reflects the discussion and decisions taken at the fifty-second session (A/CN.9/931) and revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat's work on the draft text.

General drafting issue

6. As a general drafting matter, the Working Group may wish to consider the form in which this draft text should be completed. If it is decided to retain the text as "Legislative Provisions", the references in some of the draft articles to "this Law" might need to be replaced (e.g., preamble and articles 1, 2 bis, 2 ter, 2 quater, 11 and 19). In addition, the relationship of this text to the UNCITRAL Model Law on Cross-Border Insolvency could be considered, particularly with respect to additional

¹ Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), subpara. 259(a); A/CN.9/763, paras. 13–14; Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), para. 326.

definitions that might be required if this draft text is to be a standalone text (see notes on article 2).

II. Draft legislative provisions on facilitating the cross-border insolvency of enterprise groups

[Part A]

Chapter 1. General Provisions

Preamble

The purpose of this Law is to provide effective mechanisms to address cases of cross-border insolvency affecting the members of an enterprise group, in order to promote the objectives of:

- (a) Cooperation between courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency affecting members of an enterprise group;
- (b) Cooperation between insolvency representatives appointed in this State and foreign States in cases of cross-border insolvency affecting members of an enterprise group;
- (c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;
- (d) Fair and efficient administration of cross-border insolvencies concerning enterprise group members that protects the interests of all creditors and other interested persons, including the debtors;
- (e) Protection and maximization of the overall combined value of the operations and assets of enterprise group members affected by insolvency and of the enterprise group as a whole;
- (f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and
- (g) Adequate protection of the interests of the creditors of each group member participating in a group insolvency solution.

Notes on the preamble

1. The substance of the preamble as drafted was approved at the fifty-second session (A/CN.9/931, para. 65). The Working Group may wish consider, to ensure consistent usage in the draft text, whether there is a need to reflect the two dimensions of subparagraph (e), that is the "overall combined value of the operations and assets of enterprise group members affected by insolvency *and* of the enterprise group as a whole" [*emphasis added*] in other articles which refer to the "overall combined value of the group members" but not to the group as a whole. These are article 2, subparagraph (f), the definition of "group insolvency solution" and article 14, subparagraph 3(c), which relates to the statement to accompany an application for recognition.

Article 1. Scope

This Law applies to enterprise groups, where insolvency proceedings have commenced for one or more of its members, [and addresses] [including] the conduct and administration of insolvency proceedings for those enterprise group members and cross-border cooperation between those proceedings.

Notes on article 1

2. Draft article 1 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 66), based upon what was previously variant 2 of article 1 in A/CN.9/WG.V/WP.152. The opening words have been revised and the words following "including" have been retained for further consideration. In view of the additional wording, the word "including" seems inapt and might be replaced by words such as "and addresses".

Article 2. Definitions

For the purposes of these provisions:

(a) "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

(d) "Enterprise group member" means an enterprise that forms part of an enterprise group;

(e) "Group representative" means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;

(f) "Group insolvency solution" means a set of proposals developed in a planning proceeding for the reorganization, sale, or liquidation of some or all of the operations or assets of one or more enterprise group members, with the goal of preserving or enhancing the overall combined value of the group members involved;

(g) "Planning proceeding" means an insolvency proceeding commenced in respect of an enterprise group member at its centre of main interests provided:

(i) One or more other enterprise group members are participating in that proceeding for the purpose of developing and implementing a group insolvency solution;

(ii) The enterprise group member subject to the proceeding is a necessary and integral part of that group insolvency solution; and

(iii) A group representative has been appointed.

Notes on article 2

3. Draft article 2 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 67-75). Paragraphs (a), (b), (c) and (e) were approved as drafted; paragraph (d) has been shortened to remove unnecessary words; variant 2 of subparagraph (f) has been retained and subparagraph (g) has been redrafted in accordance with a proposal contained in paragraph 72 of A/CN.9/931.

4. The Working Group may wish to consider the drafting of subparagraph (f), in particular replacing the last phrase "the group members involved" with "those group members", which more clearly links that phrase with the preceding reference to "one or more enterprise group members" and removes the uncertainty created by the use of the word "involved". The Working Group may also wish to consider whether the phrase "and of the enterprise group as a whole", might, as raised in the notes on the preamble above, be added to subparagraph (f).

5. Additional definitions that might be added to the Legislative Provisions, depending on the final form of the text, might include: "court", "insolvency representative", "establishment", and "main" and "non-main" proceedings. These are terms used and defined in MLCBI and the Legislative Guide.

Article 2 bis. Jurisdiction of the enacting State

Where the centre of main interests of an enterprise group member is located in this State, nothing in this Law is intended to:

- (a) Limit the jurisdiction of the courts of this State with respect to that enterprise group member;
- (b) Limit any process or procedure (including any permission, consent or approval) required in this State in respect of that enterprise group member's participation in a group insolvency solution being developed in another State;
- (c) Limit the commencement of insolvency proceedings in this State under [*identify laws of the enacting State relating to insolvency*], if required or requested to address the insolvency of that enterprise group member; or
- (d) Create an obligation to commence insolvency proceedings [in respect of that enterprise group member] in this State when no such obligation exists.

Notes on article 2 bis

6. Article 2 bis has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 76), in particular by revising subparagraph (d) to retain the last four words without square brackets.

7. The Working Group may wish to consider whether, to ensure consistent usage and drafting of the various subparagraphs, the words in square brackets in subparagraph (d) should be added; the other subparagraphs already refer to "that group member".

Article 2 ter. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 2 quater. Competent court or authority

The functions referred to in this Law relating to the recognition of an insolvency proceeding or a planning proceeding and cooperation with foreign courts shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Chapter 2. Cooperation and coordination**Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative**

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts, foreign representatives and a group representative, where appointed, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] or other person appointed to act at the direction of the court.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts, foreign representatives or a group representative, where appointed.

Article 4. Cooperation to the maximum extent possible under article 3

For the purposes of article 3, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

- (a) Communication of information by any means considered appropriate by the court;

- (b) Participation in communication with a foreign court, a foreign representative or a group representative, where appointed;
- (c) Coordination of the administration and supervision of the affairs of enterprise group members;
- (d) Coordination of concurrent proceedings commenced with respect to enterprise group members;
- (e) Appointment of a person or body to act at the direction of the court;
- (f) Approval and implementation of agreements concerning the coordination of proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;
- (g) Cooperation among courts as to how to allocate and provide for the costs associated with cross-border cooperation and communication;
- (h) Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims;
- (i) Approval of the treatment of claims between enterprise group members;
- (j) Recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and
- (k) *[The enacting State may wish to list additional forms or examples of cooperation].*

Article 5. Limitation of the effect of communication under article 3

1. With respect to communication under article 3, the court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.
2. Participation by a court in communication pursuant to article 3, paragraph 2, does not imply:
 - (a) A waiver or compromise by the court of any powers, responsibilities or authority;
 - (b) A substantive determination of any matter before the court;
 - (c) A waiver by any of the parties of any of their substantive or procedural rights;
 - (d) A diminution of the effect of any of the orders made by the court;
 - (e) Submission to the jurisdiction of other courts participating in the communication; or
 - (f) Any limitation, extension or enlargement of the jurisdiction of the participating courts.

Article 6. Coordination of hearings

1. The court may conduct a hearing in coordination with a foreign court.
2. The substantive and procedural rights of the parties and the jurisdiction of the court may be safeguarded by the parties reaching agreement on the conditions to govern the coordinated hearing and the court approving that agreement.
3. Notwithstanding the coordination of the hearing, the court remains responsible for reaching its own decision on the matters before it.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

1. A group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.
2. A group representative is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts and foreign representatives of other enterprise group members.

Article 7 bis. Cooperation and direct communication between a [insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State], foreign courts, foreign representatives and a group representative

1. A [insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts, foreign representatives of other enterprise group members and a group representative, where appointed.
2. A [insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts, foreign representatives of other enterprise group members and a group representative, where appointed.

Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis

For the purposes of article 7 and article 7 bis, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

- (a) Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;
- (b) Negotiation of agreements concerning the coordination of proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;
- (c) Allocation of responsibilities between a [insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State], a foreign representative and a group representative, where appointed;
- (d) Coordination of the administration and supervision of the affairs of the enterprise group members; and
- (e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable.

Article 9. Authority to enter into agreements concerning the coordination of proceedings

A [insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State] may enter into an agreement concerning the coordination of proceedings involving two or more enterprise group members located in different States, including where a group insolvency solution is being developed.

Article 10. Appointment of a single or the same insolvency representative

1. The court may coordinate with foreign courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group in different States.
2. The appointment of an insolvency representative in this State and in another State under paragraph 1 does not diminish the obligations of the insolvency representative under the law of this State.

Notes on articles 2ter to 10

8. The substance of those articles as drafted was approved at the fifty-second session (A/CN.9/931, paras. 77–87). Sharing of information and protection of confidentiality under article 8 and potential conflicts of interest under article 10 will be addressed in the draft guide to enactment of those articles.

9. The Working Group may wish to consider several issues:

(a) Whether there is a need in articles 7 and 7bis to include the possibility that cooperation and direct communication might also concern (i) in article 7, an insolvency representative appointed for a group member in the same State as the group representative, and (ii) in article 7 bis, several insolvency representatives appointed for a group members in the enacting State; and

(b) Whether, under article 9, a group representative might also enter into an agreement of the type mentioned; article 8 would seem to suggest that possibility is contemplated.

Article 11. Participation by enterprise group members in a proceeding under [identify laws of the enacting State relating to insolvency]

1. Subject to paragraph 2, if a proceeding under [identify laws of the enacting State relating to insolvency] has commenced with respect to an enterprise group member whose centre of main interests is located in this State, any other enterprise group member may participate in that proceeding for the purpose of facilitating cooperation and coordination under chapter 2 of this Law, including developing and implementing a group insolvency solution.

2. An enterprise group member whose centre of main interests is located in another State may participate in a proceeding referred to in paragraph 1 unless a court in that other State prohibits it from so doing.

3. The sole fact that an enterprise group member is participating in a proceeding referred to in paragraph 1 does not subject the enterprise group member to the jurisdiction of the courts of this State for any purpose unrelated to that participation.

3 bis. Participation means that the enterprise group member has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution.

4. Participation by any other enterprise group member in a proceeding referred to in paragraph 1 is voluntary. An enterprise group member may commence its participation or opt out of participation at any stage of such a proceeding.

5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution.

Notes on article 11

10. Article 11 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 88–90): the words “for the purpose of facilitating cooperation and coordination under chapter 2” have been added to paragraph 1.

together with the words "of this Law" to clarify the reference (see the note in para. 6 of the Introduction to this paper) and the words "for the purpose of" that followed the word "including" have been deleted. Paragraph 3 has been revised, taking into account article 10 of MLCBI, to provide greater certainty and clarity with respect to the limited jurisdiction intended by the provision. The description of what constitutes participation has been separated from paragraph 3 and placed in new paragraph 3bis. Limits that might be applicable under domestic law to a group member's ability to opt in or out of participation in a planning proceeding under paragraph 4 will be addressed in the draft guide to enactment of this article.

Chapter 3. Conduct of a planning proceeding in this State

Article 12. Appointment of a group representative

1. When one or more enterprise group members participate in a proceeding referred to in article 11, and the requirements of article 2, subparagraphs (g)(i) and (ii) are [otherwise] met, the court may appoint a group representative, by which the proceeding becomes a planning proceeding.

2 [3]. A group representative is authorized to seek relief in this State to support the development and implementation of a group insolvency solution.

3 [4]. A group representative is authorized to act in a foreign State on behalf of a planning proceeding and, in particular, to:

- (a) Seek recognition of the planning proceeding and relief to support the development and implementation of the group insolvency solution;
- (b) Seek to participate in a foreign proceeding relating to an enterprise group member participating in the planning proceeding; and
- (c) Seek to participate in a foreign proceeding relating to an enterprise group member not participating in the planning proceeding.

Notes on article 12

11. Article 12 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 91), adding the references in the chapeau to subparagraphs (g)(i) and (g)(ii); deleting subparagraph 2; removing the square brackets from around paragraph 3 (now para. 2) and deleting the text "as permitted by the applicable foreign law" previously in square brackets in paragraph 4 (now para. 3).

12. The Working Group may wish to consider the following drafting changes:

- (a) The word "otherwise" in paragraph 1 might be deleted as it creates some uncertainty as to what is intended; and
- (b) The references in subparagraphs (b) and (c) to a "foreign proceeding" (which is not currently a defined term) might need to be expanded to make it clear whether they are intended to refer to proceedings commenced under the laws of the foreign State relating to insolvency or more generally to any proceeding relating to an enterprise group member. The substance of article 18, which is the inbound provision complementary to subparagraph 3(b) which authorizes that participation in the foreign State, would suggest that the same drafting should be used in article 12, subparagraphs 3(b) and possibly 3(c) (although noting that there is no inbound authorization in article 18 equivalent to article 12, subparagraph 3(c), as it was previously deleted (see A/CN.9/903, para. 125 and A/CN.9/931, para. 92)).

Article 13. Relief available to a planning proceeding

1. To the extent needed to preserve the possibility of developing or implementing a group insolvency solution or to protect the assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any of the following relief:

- (a) Staying execution against the assets of the enterprise group member;
- (b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;
- (c) Staying any insolvency proceedings concerning a participating enterprise group member;
- (d) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;
- (e) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;
- (f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;
- (g) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply; and
- (h) Granting any additional relief that may be available to *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* under the laws of this State.

2. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to insolvency proceedings [unless not commencing an insolvency proceeding is a consequence of an undertaking given under articles 21 or 22].

3. With respect to the assets or operations located in this State of an enterprise group member that has its centre of main interests in another State, relief under this article may only be granted if that relief does not interfere with the [conduct and] administration of insolvency proceedings taking place in that State.

Notes on article 13

13. Article 13 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 56 and 93); aligning paragraph 2 with the equivalent paragraphs of articles 15 and 17 and deleting the square brackets around "or implementing" in paragraph 1.

Subparagraph (c)

14. Subparagraphs (c) and (g), unlike the other subparagraphs of the draft article, concern only those group members participating in a planning proceeding. For that reason, it may improve the drafting if subparagraph (c) was to be placed at the end of paragraph 1. That might avoid any confusion in the subparagraphs that follow subparagraph (c) and refer to "the group member", meaning the group member as

referred to in the chapeau of paragraph (both "subject to" and "participating in" the planning proceeding) rather than the group member referred to in subparagraph (c).

Subparagraph 1(g)

15. The drafting of subparagraph (g) could be aligned with the drafting used in subparagraph (c) which refers, in the singular, to "a participating group member". In that case, the drafting of subparagraph (g) could be "Recognizing arrangements concerning the funding of a participating enterprise group member where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply" (see also article 15, subparagraph 1(g) and article 17, subparagraph(h)).

16. The proviso in article 13, subparagraph (g), "subject to any appropriate safeguards the court may apply" is already contained in article 19, paragraph 2, and thus may not be required in article 13. The guide to enactment of article 13 could draw attention to the relevance of article 19, paragraph 2. This observation applies to the same drafting in articles 15, subparagraph 1(g) and 17, subparagraph 1(h).

Paragraph 3

17. The Working Group may wish to consider whether the words in square brackets "[conduct and]" in article 13, paragraph 3, should be deleted to align the drafting with article 15, paragraph 5 and article 17, paragraph 4.

Issue for consideration with respect to the relief provisions — articles 13, 15 and 17

18. The Working Group may wish to consider the following scenario in terms of the application of the relief articles — article 13, paragraph 2, article 15, paragraph 4, article 17, paragraph 3, and article 23, paragraph 1.

Four members of an enterprise group have their respective COMIs in States A, B, C, and D. All four group members are insolvent. All four States have enacted articles 1–21 of the Legislative Provisions, but only C and D have enacted articles 22 and 23.

A proceeding in State A becomes a planning proceeding, and the other three group members all choose to participate. The group representative seeks, and is granted, recognition of the A planning proceeding in B, C, and D. In C, the court uses article 23, paragraph 1 to decline to open a main proceeding for the insolvent group member with its COMI in C, on the basis that the A planning proceeding will adequately protect the interests of creditors. The court sees no need to commence a proceeding in C at this stage, given that the development of a group solution seems likely. Articles 21 and 22 have not been used in any of the States.

In that situation, none of the remaining States A, B or D — regardless of whether they are the location of the planning proceeding (A) or have enacted the supplemental provisions (D) — would be able to grant any relief (whether interim or otherwise) with respect to establishments or assets of the C entity in their territories. The court in A would be precluded from ordering such relief under article 13, paragraph 2 because no insolvency proceeding has been commenced for the C entity and no undertaking has been given under article 21 or 22. For similar reasons, the courts in B and D could not use article 15, paragraph 4 to provide interim relief or article 17, paragraph 3 to provide relief following recognition of the planning proceeding.

19. If the entity in C is important for the group solution to work, States A and B in the hypothetical may wish to be able to grant relief if needed; it might be asserted that C's choice to enact and use article 23, paragraph 1 shouldn't effectively preclude other States from using articles 13, 15 and 17 as needed within their own territories.

20. Various solutions might be considered. The first could be to address that issue through the drafting used in article 13, paragraph 2 (and arts. 15, para. 4 and 17, para. 3) to address the prohibition on ordering relief with respect to the assets of what are, essentially, "solvent" entities. The more neutral drafting of "not subject to insolvency proceedings" was used to avoid use of the word "solvent" (given the difficulty of reaching an agreed definition) and the need for the court to resolve the question of whether a particular entity was solvent. It does not, however, sufficiently describe an exception that is intended to reflect the financial status of the group member and the fact that it is not subject to the insolvency law on the basis of that status.

21. Another solution might be to describe the entity as "solvent" (with the guide to enactment explaining what the use of that word is intended to convey), in which case the proviso ("unless not commencing ...") may not be required. The problem posed in the hypothetical above would not arise.

22. A further solution might be to add a reference to article 23 in the proviso. In that case, it might be helpful to refer to articles 21bis, 22bis and 23 (rather than articles 21, 22 and 23) on the basis that it is those articles that directly address the power of the court to decline to commence a proceeding. The proviso might thus be revised along the lines of "unless a [competent] court has declined to commence an insolvency proceeding with respect to that group member under article 21bis, 22bis or 23." That drafting would address the problem posed by the hypothetical, albeit from a different angle unrelated to the financial status of the "solvent" group member.

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 14. Application for recognition of a foreign planning proceeding

1. A group representative may apply in this State for recognition of the planning proceeding to which the group representative was appointed.
2. An application for recognition shall be accompanied by:
 - (a) A certified copy of the decision appointing the group representative; or
 - (b) A certificate from the foreign court affirming the appointment of the group representative; or
 - (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the appointment of the group representative.
3. An application for recognition shall also be accompanied by:
 - (a) A statement identifying each enterprise group member participating in the planning proceeding;
 - (b) A statement identifying all members of the enterprise group and all proceedings commenced in respect of enterprise group members participating in the planning proceeding that are known to the group representative; and
 - (c) A statement to the effect that the enterprise group member subject to the planning proceeding has its centre of main interests in the State where the planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding.
4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Notes on article 14

23. Article 14 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 53–55). The drafting clarifies that the subparagraphs in paragraph 2 are alternatives; the previous requirement for "evidence" in subparagraph 3(a) has been replaced with a requirement for "a statement"; and the word "involved"

at the end of subparagraph 3(c) has been replaced by a reference to those group members subject to or participating in the planning proceeding. The draft guide to enactment will explain the difference between those two categories of group members.

Subparagraph (b)

24. For greater clarity, it may be helpful to add the word "insolvency" before the first reference to "proceedings" in subparagraph (b), if the subparagraph is intended to be limited in that manner. It may also be helpful to clarify whether the words "are known to the group representative" refer to the enterprise group members known to the group representative or to the proceedings known to the group representative, or both.

Subparagraph (c)

25. With respect to the statement on overall value in subparagraph (c), see the note above with respect to the preamble.

Article 15. Provisional relief that may be granted upon application for recognition of a foreign planning proceeding

1. From the time of filing an application for recognition [of a planning proceeding] until the application is decided upon, where relief is urgently needed to preserve the possibility of developing or implementing a group insolvency solution or to protect the assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court may, at the request of the group representative, grant relief of a provisional nature, including:

- (a) Staying execution against the assets of the enterprise group member;
- (b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;
- (c) Staying any insolvency proceedings concerning the enterprise group member;
- (d) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;
- (e) In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;
- (f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;
- (g) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply; and
- (h) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.

2. [Insert provisions of the enacting State relating to notice.]

3. Unless extended under article 17, subparagraph 1(a), the relief granted under this article terminates when the application for recognition is decided upon.
4. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that group member is not subject to insolvency proceedings [unless not commencing an insolvency proceeding is a consequence of an undertaking given under articles 21 or 22].
5. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place in the centre of main interests of an enterprise group member participating in the planning proceeding.

Notes on article 15

26. Article 15 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 56–57). The title has been revised to refer to “Provisional” relief; the word “appropriate” has been deleted from the chapeau; the words “in any jurisdiction” have been deleted at the end of paragraph 4 and the words in square brackets have been added at the end of paragraph 4, in response to the issue raised in document A/CN.9/WG.V/WP.152, para. 21, for further consideration (see also the note under article 13 relating to the relief provisions and the drafting of the proviso in para. 4).
27. The Working Group may wish to note it was agreed at its fifty-second session (A/CN.9/931, para. 57), that additional analysis was required to ensure that that draft text would address situations arising in connection with paragraph 4 in which articles 21 and 22 did not apply.

Paragraph 1

28. The words “of a planning proceeding” might be added to paragraph 1 as indicated.

Subparagraph 1(e)

29. An issue to be considered with respect to subparagraph 1(e) is whether the existing language (“Where an insolvency representative is not able to administer or realize ...”) would be sufficient to address the situation where no insolvency representative was appointed in the enacting State (e.g., because article 21 bis or 22 bis is applicable) and whether further language along the lines of “or no insolvency representative has been appointed” might be required, for example, in the second sentence.

Subparagraph 1(g)

30. With respect to the drafting of subparagraph 1(g), see the note above concerning the drafting of article 13, subparagraph 1(g).
31. The proviso in article 15, subparagraph 1(g) “subject to any appropriate safeguards the court may apply” is already covered by article 19, paragraph 2 and thus may not need to be repeated in article 15. The guide to enactment of article 15 could ensure the relevance of article 19 is highlighted. As noted above with respect to article 13, this observation applies also to articles 13 and 17.

Article 16. Decision to recognize a foreign planning proceeding

1. Subject to article 2 ter, a planning proceeding shall be recognized if:
 - (a) The application meets the requirements of article 14, paragraphs 2 and 3;
 - (b) The proceeding is a planning proceeding within the meaning of article 2, subparagraph (g); and

(c) The application has been submitted to the court referred to in article 2 quater.

2. An application for recognition of a planning proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 3, the group representative shall inform the court of material changes in the status of the planning proceeding or in the status of its own appointment occurring after the application for recognition is made, as well as changes that might bear upon the relief granted on the basis of recognition.

Notes on article 16

32. On the basis that paragraph 1 lists the elements to be satisfied to grant recognition, the Working Group may wish to consider whether a further requirement might be added to paragraph 1 to reflect the approach taken by the drafting of article 17, subparagraph 1(b) of MLCBI, that is, that the group representative applying for recognition should be a group representative within the meaning of article 2, subparagraph (e) or whether article 14 is sufficient addresses that issue in the context of an application for recognition.

33. Article 16, paragraph 4 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 58): the word "material" has been retained in paragraph 4 and the words "as well as" have been added before the word "changes" in the final phrase of that paragraph.

Article 17. Relief that may be granted upon recognition of a foreign planning proceeding

1. Upon recognition of a planning proceeding, where necessary to preserve the possibility of developing or implementing a group insolvency solution or to protect the assets of an enterprise group member subject to or participating in the planning proceeding or the interests of the creditors of such an enterprise group member the court, at the request of the group representative, may grant any of the following relief:

- (a) Extending any relief granted under article 15, paragraph 1;
- (b) Staying execution against the assets of the enterprise group member;
- (c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;
- (d) Staying any insolvency proceedings concerning the enterprise group member;
- (e) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;
- (f) In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;
- (g) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(h) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply; and

(i) Granting any additional relief that may be available to *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* under the laws of this State.

2. In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the distribution of all or part of the enterprise group member's assets located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task.

3. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to insolvency proceedings [unless not commencing an insolvency proceeding is a consequence of an undertaking given under articles 21 or 22].

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place in the centre of main interests of an enterprise group member participating in the planning proceeding.

Notes on article 17

34. Article 17 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 56, 60 and 93), deleting the words "in any jurisdiction" and adding the words in square brackets at the end of paragraph 3 in order to conform article 17 with articles 13 and 15.

Subparagraph 1(h)

35. See the note with respect to the drafting of the equivalent subparagraph in article 13 (subparagraph 1(g)) and 15 (subparagraph 1(e)) above.

Article 18. Participation of a group representative in a proceeding under *[identify laws of the enacting State relating to insolvency]*

Upon recognition of a planning proceeding, the group representative may participate in any proceeding under *[identify laws of the enacting State relating to insolvency]* concerning enterprise group members that are participating in the planning proceeding.

Notes on article 18

36. The substance of article 18 as drafted was approved at the fifty-second session (A/CN.9/931, para. 61).

Article 19. Protection of creditors and other interested persons

1. In granting, denying, modifying or terminating relief under this Law, the court must be satisfied that the interests of the creditors and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected.

2. The court may subject relief granted under this Law to conditions it considers appropriate, including the provision of security.

3. The court may, at the request of the group representative or a person affected by relief granted under this Law, or at its own motion, modify or terminate such relief.

Notes on article 19

37. The substance of article 19 as drafted was approved at the fifty-second session (A/CN.9.931, para. 62).

38. Article 19 raises issues that are also addressed in the Preamble, subparagraph (g) and article 23, concerning the identity of creditors whose interests are to be protected. The Preamble, subparagraph (g), refers to adequate protection of the interests of the "creditors of each group member" participating in the group solution, thereby recognising the integrity of the individual group member and the fundamental importance of protecting its particular creditors within the enterprise group and the group insolvency solution. Article 19, paragraph 1, does not seem to draw this distinction, referring generally to "the creditors". In addition to the lack of certainty arising from that drafting, it may create a possibility that the interests of one group member's creditors could be traded off against the aggregated interests of the creditors of all participating members. This would appear to interfere with the separate legal identity of group members, and might tend to discourage participation in group solutions.

39. Additionally, article 19, paragraph 1, seeks to protect the interests of the group member itself (not just its creditors and others interested in it) as a separate criterion to be satisfied. This is not reflected in subparagraph (g) of the Preamble (although it may be reflected in part in subparagraph (d) of the Preamble by the reference to protection of the interests of debtors). The Working Group may wish to consider (a) whether the requirement to protect the interests of the group member itself is unnecessary and poses an additional hurdle to be overcome in order for the court to grant relief; and (b) what interests a group member would have that are distinctly different from the interests of its creditors and warrant separate protection.

40. Any revision of article 19 might take into account article 23, which refers to protecting the interests of creditors of affected group members participating in a planning proceeding.

Article 20. Approval of [local elements of] a group insolvency solution

Variant 1 of paragraph 1

1. Where a group insolvency solution affects an enterprise group member participating in a planning proceeding that has its centre of main interests or establishment in this State and a proceeding under [identify the laws of the enacting State relating to insolvency] has commenced in this State, the group insolvency solution shall be submitted to the court in this State for approval.

Variant 2 of paragraph 1

1. When a proceeding under [identify the laws of the enacting State relating to insolvency] has commenced in this State with respect to an enterprise group member that (a) has its centre of main interests or establishment in this State, (b) is participating in a planning proceeding, and (c) is affected by a group insolvency solution, the group insolvency solution shall be submitted to the court in this State for approval.

2. The court shall refer the portion of the group solution affecting the enterprise group member referred to in paragraph 1 for approval in accordance with [identify the laws of the enacting State relating to insolvency].

3. If the approval process referred to in paragraph 2 results in approval of the relevant portion of the group insolvency solution, the court shall [confirm that portion relating to assets or operations in this State] [specify the role to be played by the court in accordance with the law of the enacting State with respect to approval of a reorganization plan].

Variant 1 of paragraph 4

4. Where a group solution affects an enterprise group member participating in the planning proceeding that has its centre of main interests or establishment in this State and no proceeding under [identify the laws of the enacting State relating to insolvency] has commenced in this State or article 21 applies, no such proceeding needs to be commenced if unnecessary to confirm the portion of the group insolvency solution affecting the enterprise group member.

Variant 2 of paragraph 4

4. When no proceeding under [identify the laws of the enacting State relating to insolvency] has commenced in this State with respect to an enterprise group member that (a) has its centre of main interests or establishment in this State, (b) is participating in a planning proceeding, and (c) is affected by a group insolvency solution, or article 21 applies, no such proceeding needs to be commenced if unnecessary to confirm the portion of the group insolvency solution affecting the enterprise group member.

4 bis. A group insolvency solution shall have effect in this State if it has received all approvals required in accordance with the laws of this State.

4 ter. A group representative may request additional assistance under other laws of this State to confirm the portion of the group insolvency solution affecting the enterprise group member.

5. A group representative is entitled to apply directly to a court in this State to be heard on issues related to approval and implementation of a group insolvency solution.

Notes on article 20

41. Article 20 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 63–64).

Title

42. The Working Group may wish to consider whether the title of the article might be simplified to "Approval of a group insolvency solution".

Relevance of recognition to article 20

43. It might be noted that while article 20 appears in chapter 4 dealing with recognition of a planning proceeding, article 20 itself makes no reference to recognition of a planning proceeding as a pre-condition for either seeking approval of a group insolvency solution or for the group representative to apply directly to the court to be heard on issues relating to approval and implementation of the solution under article 20, paragraph 5. The Working Group may wish to consider whether recognition is required in order to seek approval of a group insolvency solution; if not, that issue might be addressed in the guide to enactment.

Paragraph 1

44. Variant 2 of paragraph 1 attempts to give greater clarity to the three conditions concerning the group member that will lead to submission of the group insolvency solution for approval in the enacting State. It applies to the situation where an insolvency proceeding concerning the affected group member has commenced in the enacting State.

Paragraph 3

45. Paragraph 3 retains two alternative approaches to approval of a group insolvency solution — the first requires confirmation by the court, the second leaves it up to the law of the enacting State to specify the role to be played by the court. Not all States require court confirmation of a reorganization plan approved in accordance with domestic law (e.g. by creditors), as recognized by the Legislative Guide on

Insolvency Law (part two, chapter IV, paras. 56-65). If the two alternatives are retained, the use of the word "confirm" in paragraph 4ter may need to be reconsidered. Moreover, for jurisdictions that do not require "confirmation" in a domestic setting, it may not be clear what is required in the Legislative Provisions by way of "confirmation"; this could be explained in the guide to enactment along the lines of, or by reference to, the material in the Legislative Guide.

Paragraph 4

46. Variant 2 of paragraph 4 uses the same approach to drafting as Variant 2 of paragraph 1 in the situation in which no proceeding has commenced in the enacting State. Paragraph 4bis reflects additional text approved by the Working Group at its fifty-second session (A/CN.9/931, para. 64). Paragraph 4ter, previously 4bis, has been slightly revised to refer to confirmation rather than implementation of a group insolvency solution (A/CN.9/931, para. 64).

Paragraph 5

47. Consideration might be given to whether article 20, paragraph 5 might be moved to article 12, paragraph 4, which identifies the activities the group representative is authorized to conduct. This would have the advantage of placing related provisions on the powers of the group representative together in the same article. The guide to enactment could provide relevant explanation.

Chapter 5. Treatment of foreign claims

Article 21. Undertaking on the treatment of foreign claims: non-main proceedings

1. To minimize the commencement of non-main proceedings and facilitate the treatment of claims in an enterprise group insolvency, a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding commenced in this State in accordance with the treatment it would be accorded in the non-main proceeding, provided:

(a) An undertaking to accord such treatment is given by the insolvency representative appointed in the main proceeding in this State. Where a group representative is appointed, the undertaking should be given jointly by the insolvency representative and the group representative;

(b) The undertaking meets the formal requirements, if any, of this State; and

(c) The court approves the treatment to be accorded in the main proceeding.

2. An undertaking given under paragraph 1 shall be enforceable and binding on the insolvency estate.

Notes on article 21

48. Article 21 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, paras. 45-47), based upon variant 2 of the text contained in document A/CN.9/WG.V/WP.152 and a proposal for redrafting the article as set forth in document A/CN.9/931, para. 46. The heading has been aligned with the revised article. It may be helpful to add the words "of the enterprise group member" at the end of paragraph 2 for greater clarity.

Article 21 bis. Powers of the court of this State with respect to an undertaking under article 21

If a foreign representative of an enterprise group member or a group representative from another State in which a main proceeding is pending has given an undertaking in accordance with article 21, a court in this State, may:

(a) Approve the treatment to be provided in the foreign main proceeding to the claims of creditors located in this State; and

- (b) Stay or decline to commence a non-main proceeding.

Notes on article 21 bis

49. Article 21 bis has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 48), based upon variant 2 of the text contained in document A/CN.9/WG.V/WP.152. The word "commitment" has been replaced with the word "undertaking" and the cross-reference to article 19 deleted (the relevance of article 19 will be addressed in the guide to enactment).

[Part B]

Supplemental provisions

Article 22. Undertaking on the treatment of foreign claims: main proceedings

To facilitate the treatment of claims that could otherwise be brought by a creditor in a[n insolvency] proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may undertake, and the court in this State may approve, to accord that claim the treatment in this State that it would have received in a[n insolvency] proceeding in that other State. Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.

Notes on article 22

50. Article 22 has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 50). The word "would" in the first line has been replaced with the word "could", the word "commitment" has been replaced with the word "undertaking", the reference to the treatment of creditors has been replaced with a reference to the treatment of claims. The heading has been aligned with the revised article.

51. Replacing the word "commitment" with the word "undertaking" makes the drafting of the phrase "may undertake, and the court in this State may approve, to accord" somewhat awkward in English. A solution may be to place the reference to approval by the court in a separate sentence along the lines of "The court may approve the treatment to be accorded by the undertaking." An alternative approach would be delete any reference to approval by the court from article 22 on the basis that it is already covered by article 22bis.

52. Articles 21 and 21bis have been revised to make it clear that they refer to an undertaking given to avoid or minimize the commencement of non-main proceedings. While article 22 is intended to refer to avoiding the commencement of main proceedings, there is nothing in the drafting that specifically indicates that intent and it is unclear how it differs from article 21. As currently drafted, the reference to the "proceeding in another State" could be either a non-main proceeding, in which case the article repeats the content of article 21, or it could be a main proceeding, in which case it is different. The Working Group may wish to consider whether any further clarification is required, including adding "insolvency" before the word "proceeding" as indicated.

Article 22 bis. Powers of a court of this State with respect to an undertaking under article 22

If a foreign representative of an enterprise group member or a group representative from another State in which a[n insolvency] proceeding is pending has given an undertaking under article 22, a court in this State may:

- (a) Approve the treatment in the foreign proceeding of the claims of creditors located in this State; and
- (b) Stay or decline to commence a main proceeding.

Notes on article 22 bis

53. Article 22 bis has been revised in accordance with the report of the fifty-second session (A/CN.9/931, para. 51), based upon variant 2 of the text contained in document A/CN.9/WG.V/WP.152. The word "commitment" has been replaced with the word "undertaking" and the cross-reference to article 19 deleted. The Working Group may wish to consider whether "insolvency" should be added before the word "proceeding" as indicated.

Article 23. Additional relief

1. If, upon recognition of a planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in [the planning] [that] proceeding, particularly where an undertaking under article 21 or 22 has been given, the court, in addition to granting any relief described in article 17, may stay or decline to commence insolvency proceedings in this State relating to any enterprise group member participating in the planning proceeding.

2. Notwithstanding article 20, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of the creditors of the affected enterprise group member [are] [or will be] adequately protected, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 17 that is necessary for implementation of the group insolvency solution.

Notes on article 23

54. Article 23 was approved at the fifty-second session of the Working Group as drafted (A/CN.9/931, para. 52); the word "commitment" has been replaced with the word "undertaking". See the note on relief under article 13 above. The Working Group may wish to consider whether words "the planning" in paragraph 1 might be replaced by the word "that" as indicated and the words "or will be" might be added in paragraph 2 as indicated.